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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term 1955

No. 500

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., ETC.,
Petitioner,

v.

HERBERT BROWNELL, JR., Attorney General of the United States, as Successor to the Alien Property Custodian, and IVY BAKER PRIEST, Treasurer of the United States,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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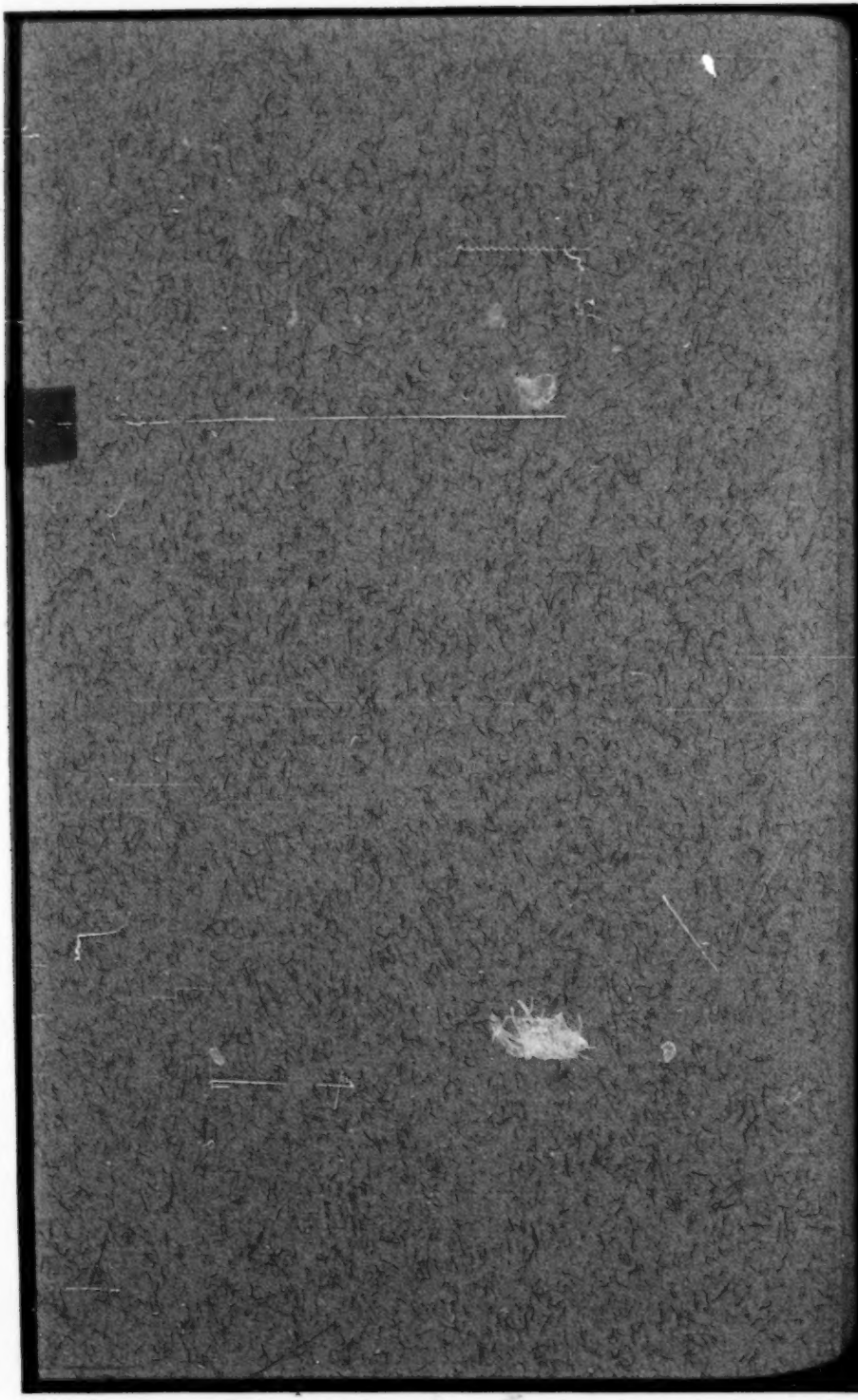

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Societe Internationale Pour Participations Industrielles et Commerciales, S.A.,[1] a Swiss holding corporation having its domicile at Basel, Switzerland—plaintiff in the District Court in an action for recovery

[1] For sake of brevity, petitioner is known as "I. G. Chemie" or "Interhandel".

of vested property under Section 9(a) of the Trading with the Enemy Act (50 U.S.C. App. 9a)—prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on June 30, 1955, affirming a dismissal of petitioner's action with prejudice because of petitioner's non-compliance, through no fault of its own, with a discovery order of the District Court.

OPINIONS BELOW

The principal opinion of the District Court (J.A.[2] 605) is reported in 111 F. Supp. 435; and a supplemental memorandum of November 16, 1953, (J.A. 672) is unreported. The opinion of the Court of Appeals (R. 1919) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals with respect to which the writ of certiorari is sought was entered on June 30, 1955, (R. 1941). Order denying petition for rehearing was entered September 1, 1955 (R. 1959). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

In an action by a Swiss national for the recovery of property under the Trading with the Enemy Act,

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[2] J.A. refers to the printed Joint Appendix which is in four volumes. The pages of the Record certified to this Court carry the same page-numbers through Volume IV. Therefore, material in the Joint Appendix will be cited J.A. —. Additional documents following Volume IV continue the numbering sequence of the Joint Appendix, but will be cited as R. —, instead of J.A. —.

may the District Court validly enter at the pretrial stage an order of dismissal with prejudice, as a sanction for non-compliance with an order to produce in Switzerland documents belonging to and in the possession of an affiliated bank where (a) the issue of fact as to control over the desired documents was resolved upon irregularly conducted proceedings on the basis of *ex parte* data, hearsay and the like, without the hearing of witnesses or cross-examination; (b) actual production of the documents in Switzerland was prevented by a lawful order of the Swiss Government; and (c) the judicially determined fact of petitioner's good faith in failing to comply with the order to produce, conclusively negatives the presumption of bad faith constitutionally necessary to support such a dismissal under *Hammond Packing Co.* v. *Arkansas*? There is the further question whether the District Court should have considered the vast number of documents actually produced as constituting substantial compliance with its order, at least to the extent of conducting an inquiry as to the necessity, if any, for the production of the balance of the papers.

Broken down into the several parts, the questions are as follows:

(1) Whether the irregular proceedings and record before the District Court and the reasons given by that Court, support its determination that the documents called for by the discovery order were in the possession, custody or control of petitioner. In this connection, an inherent question is whether the standards for adequate findings and other proper safeguards in respect of a trial of a case upon the merits by a judge, should not equally apply to a *factual* hearing upon a discovery motion under Rule 34, Fed. R. Civ. P.,

especially where the facts are extremely complex and disputed, and the drastic sanction of dismissal with prejudice and without a trial on the merits is imposed upon a party.

(2) Whether, assuming *arguendo* that the discovery order was valid, a subsequent seizure of the documents by the Government of Switzerland to prevent their disclosure in violation of the secrecy precepts of that country, thus making compliance with the order impossible, would not excuse petitioner from the requirement to produce and *must* result in a dismissal of petitioner's action with prejudice.

This question involves the basic points (a) as to whether, in a case of involuntary and innocent inability to comply, a dismissal of petitioner's action with prejudice is supportable under Rule 37(b) (2) (iii) or Rule 41(b) of the Federal Rules of Civil Procedure;[3] and, (b) also as to whether such a dismissal violates the constitutional guarantee of due process within the doctrine of *Hammond Packing Company* v. *Arkansas,* 212 U.S. 322, in view of the fact that there was a finding by the Special Master—approved by the Court—of good faith of the petitioner regarding non-compliance.

(3) Whether, after petitioner, by certain measures, was able to tender for inspection over 63,000 of the called-for documents, the District Court abused its discretion in not inquiring if there was *good cause* for the production of any more. Respondents refused to look at such documents and the District Court did not deem it necessary for respondents to do so, taking

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[3] The District Court relied upon both rules, while the Court of Appeals relied only upon Rule 41(b).

the position that no examination was required until *full* discovery was tendered.

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The pertinent constitutional and statutory provisions and rules of procedure are printed in Appendix A, *infra,* at pages 1a to 7a.

STATEMENT

On October 21, 1948, petitioner filed its complaint in the United States District Court for the District of Columbia against the Attorney General and the Treasurer of the United States pursuant to Section 9(a) of the Trading with the Enemy Act, as amended (50 U.S.C. App. 9a), to recover property belonging to it which had been vested by the Alien Property Custodian under Section 5(b) of the Act. The property in question consisted of over 90% of the capital stock of General Aniline & Film Corporation (a Delaware corporation having its principal office in New York City), estimated to be of the value of $100,000,000, and cash of about $2,000,000 in New York banks. (J.A. 148). The issues in the action are (1) whether appellant was enemy-tainted (German) within the doctrine of *Clark* v. *Uebersee Finanz-Korporation,* 332 U.S. 480, and (2) the ownership of the vested property. (J.A. 358, 371). The pleadings are at issue, but various pretrial procedures and resulting hearings have delayed a trial on the merits.

In early 1949, cross-motions were filed by the parties for discovery of the other's relevant papers and documents. Both motions were granted and a schedule of discovery proceedings was prescribed by the

court. (J.A. 335). Respondents had sought also to require petitioner to produce the records of a Swiss private bank known as H. Sturzenegger & Cie. (formerly called Ed. Greutert & Cie.), upon the ground that such bank was an affiliate of petitioner. Petitioner opposed that portion of respondent's discovery motion upon the ground, amongst others, that it had neither possession, custody nor control of the bank's records, as required by Rule 34, Fed. R. Civ. P. The District Court made a tentative finding of *prima facie* control (see memo, op. Ch. J. Laws dated June 23, 1949, J.A. 338), and included in its order of July 5, 1949, the requirement that the petitioner produce the bank's records for inspection in Switzerland by the respondents' agents. (J.A. 339).

Pursuant to the discovery schedule, respondents' agents appeared in Switzerland ready to inspect records of petitioner and the Sturzenegger bank records on or about July 10, 1950. Prior to that time, on several occasions, petitioner had asked the District Court to relieve it of the requirement relating to the bank's papers, but to no avail other than that the Court said that it would deal with the situation as it might thereafter develop. (J.A. 74).

On June 21, 1950, the Swiss Government, acting through its Department of Justice and Police, and pursuant to what is known in Switzerland as its "preventive police power," seized the bank's records to prevent their wholesale disclosure to the officials of the American Government in violation of the Swiss secrecy laws. (J.A. 415, 469). Consequently, respondents were unable at that time to inspect the bank's records, but they did inspect the corporate records of

petitioner, taking over 70,000 microfilms of its books and papers.[4]

In the Fall of 1950, respondents moved to dismiss petitioner's complaint as sanction for its failure to produce the Sturzenegger bank's records, charging collusion between the Swiss Government and petitioner. (J.A. 417). The District Court referred to Special Master William J. Hughes, Jr., the questions as to (a) the charge of collusion, (b) the efforts of petitioner to overcome the seizure order and (c) the validity under Swiss law of the seizure. (J.A. 452-459). The reference and its resulting proceedings—frequently referred to by the parties as the "good faith proceedings"—consumed the time from February, 1951 to February, 1953, and ended in complete exoneration of petitioner. (J.A. 545). The District Court (Chief Judge Laws), in his opinion of February 19, 1953, (111 F. Supp. 440; J.A. 610-611), overruled respondents' exceptions to the Master's report, and ratified it in its entirety. (J.A. 633).

Nevertheless, and despite its finding that petitioner was unable to produce the Sturzenegger records, the District Court sustained respondents' motion to dismiss upon the ground that petitioner's non-compliance with the discovery order was in and of itself sufficient basis to impose the sanction of dismissal with prejudice. (111 F. Supp. 445; J.A. 623).

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[4] It should be kept in mind that *petitioner and H. Sturzenegger & Cie are two different companies*, and that the latter is not a party to these proceedings. Production of petitioner's records is not in issue in the present appeal. *Petitioner complied substantially with that portion of the disputed discovery order requiring it to produce its own records.*

In the course of petitioner's efforts to have the Swiss Government dissolve the seizure order, it had developed that the Swiss Government was willing to relieve the situation if and to the extent that the bank's customers, and every one else having a right to claim secrecy in respect of the bank's records, would execute waivers of their secrecy rights.[5] The District Court took cognizance of this provision in its decision of February 19, 1953, (111 F. Supp. 447; J.A. 626), and postponed dismissal for several successive periods of time to allow petitioner to pursue that course.

Faced with the threat of dismissal, petitioner undertook this task, and by October 19, 1953, had accomplished the release for inspection of over 63,000 Sturzenegger bank records. (J.A. 668). These records were brought to the United States and tendered to respondents for inspection, but respondents declined to look at them, (J.A. 666), and the District Judge approved of this attitude on their part, taking the position that unless petitioner tendered *every single record* of the bank, it would have failed to comply with his discovery order. (J.A. 672-673).

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[5] The Special Master's Conclusion No. 10 (J.A. 547) in the good faith proceedings comments upon the effect of these secrecy rights, as follows:

> "10: The necessity under Swiss law for the waiver by parties—multiple or otherwise—who own the secrets contained in the Sturzenegger papers demonstrates that a holding of *prima facie* control of such papers by the plaintiff, within the terms of Rule 34 F.R.C.P., does not fully resolve the problem. *If the intervention of a third party, an independent agent, is necessary to produce the papers, then by definition plaintiff has no control over their production.*" (Emphasis supplied)

This plainly shows that petitioner *never* had "control" over the bank's papers.

At the juncture when petitioner had tendered the above-described documents for inspection, and had asked to be relieved from the status of default declared by the District Court's opinion of February 19, 1953, and was asking the court to extend the time further for petitioner to complete the releasing process in Switzerland, (J.A. 663-666), the District Court ordered dismissal with prejudice. (J.A. 679).

The District Court, although requested to do so, (J.A. 674-675), refused to make findings of fact. (J.A. 678). On page 10 of the Court of Appeals' opinion, (R. 1928), the District Court's opinion of February 19, 1953 (111 F. Supp. 435) is treated as sufficient in this connection. At one point on that page the Court of Appeals states that the "conclusions of the District Court" "are set forth clearly and with sufficient fullness" in the District Court's opinion; and later, on the same page it is stated that "For any purpose relevant to Rules 34 and 37 the findings are sufficient in form and definiteness; and, for purposes of our favorable review, find adequate support in the record."

Petitioner disputed the foregoing in the Court of Appeals both before and after the decision. Petitioner's analysis of the decision in this respect is set forth in its petition for rehearing in banc, copy of which is printed as Appendix B to this petition, *infra,* pages 8a to 20a. See, particularly, pp. 11a-13a.

While petitioner believes that there is not any substantial evidence in the record to support a conclusion that the Sturzenegger papers were in its possession, custody or control, as determined by the District Court, and, therefore, that such determination is *clearly erroneous,* this phase of the matter is being presented to this Honorable Court from the stand-

point that the proceedings in the District Court were improperly conducted, resulting in the establishment of *a most irregular record* which was brought to the Court of Appeals; *and that thereby there has been a substantial departure from the usual course of judicial proceedings which the Court of Appeals has improperly sanctioned.*

There was no hearing in the District Court at which witnesses testified. Hearings there were based upon arguments of counsel, both upon the law and upon inferences to be drawn from documents on file *and not on file* in the case. Documents were referred to by respondents (defendants-appellees below) in briefs and memoranda, and were neither offered in evidence nor shown to the District Judge.[6] Portions of deposi-

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[6] As an example of this most unusual situation, petitioner, in its Reply Brief below—page 15, called the attention of the Court of Appeals to an argument of respondents based upon an alleged "fact" that was not supported by a "Record" citation, and petitioner pointed out that there could be no such citation because it was not in the record before the lower court, explaining as follows: (footnote 22, page 15, Reply Brief):

> "Here is an excellent example of the presentation by appellees to the lower court in argument and briefs of 'facts' which were not in the record. We call this Court's attention to appellees' brief below, entitled 'Objections to Special Master's Report,' etc. filed September 9, 1952, (R. 2838), and particularly page 6 thereof at R. 2843. In the first full paragraph on that page, reference is made to the 'joint' telephone board. Cited in support thereof is 'D-4423, January, 1937.' Footnote 5 on that page stated that 'Citations of this nature refer to documents produced by plaintiff from its files for inspection and copying by defendants.' Such documents were not before the lower court. There are 29 of such citations on that page of appellees' brief below, none of which were actually before Judge Laws, except through the statements of appellees' counsel."

tions, referred to by respondents in their brief in the Court of Appeals, were never called to the attention of the District Judge. Exhibits to a 6,000-page deposition—not identified by the deponent in the course of the deposition—were not even shown to the District Judge, but are printed in the Joint Appendix—see Volume IV—at the insistence and expense of respondents.[7] The Court of Appeals had access to depositions of respondents' witnesses (Merton, J.A. 1826; Euler, J. A. 1865; and Schmitz, J.A. 1908), although they were not offered in evidence in the District Court and no judge has yet had occasion to rule upon petitioner's many objections appearing therein. Reports of the Swiss Compensation Office (J.A. 205-324)—containing statements and conclusions of investigators—which found their way into the files of the District Court by way of merely an identifying affidavit of one of counsel for respondents, (J. A. 198), were not proof of any alleged fact therein stated.

It was in view of the above-described situation that petitioner urged the District Judge to make findings of fact so that the evidentiary basis for his conclusions could be clearly delineated. In its petition for rehearing below, petitioner has demonstrated to the Court of Appeals that the District Court failed to state a single fact from which a conclusion of petitioner's control over Sturgenegger could be reason-

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[7] Some examples of such "exhibits"—which have not been *identified*—printed at the request of respondents, are found at J.A. 1705-1727. (See Record 11153, 11159, 11421, 11538 and 11545.) The witness, when shown or asked about such documents or their contents, answered that he did not know or recollect. See, e.g. 11161.

ably inferred. (See, *infra.* pp. 10a-11a, Appendix B).

The Court of Appeals affirmed the order of dismissal with prejudice with one modification.[8] After affirming—by very brief discussion—the primary decision of the District Court as to "control" under Rule 34, just referred to above, the Circuit Court ruled that, *despite the blameless status of petitioner itself,* dismissal with prejudice was not only provided for but required under Rule 41(b), Fed. R. Civ. P., and that the decision of this Court in *Hammond Packing Company* v. *Arkansas,* 212 U.S. 322, did not bar such a result.

The Court of Appeals was unwilling to follow the District Judge in basing the dismissal upon Rule 37 (b)(2)(iii) Fed. R. Civ., in view of the element of wilfulness that is inherent in that provision, since, of course, that element is entirely lacking in this case. Instead, both Courts embraced the idea that, aside from refusal or disobedience—which naturally contemplates wilfulness—the power is inherent in a court —reflected in Rule 41(b), Fed. R. Civ. P.—to default a party for mere failure to act regardless of his capacity to do so or his intention in that respect.

The appellate court then enunciated a doctrine—*never before considered,* petitioner believes, by the courts of the United States, except of course, by the

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[8] "One modification, however, we deem advisable, namely, that dismissal of the complaint with prejudice shall not become effective until six months after the receipt by the District Court of the mandate of this Court in this case, and not then if within such period discovery is made as ordered. This will afford another opportunity to bring the case on for a trial and decision on the merits." (R. 1940).

District Court in this case[9]—that dismissal of this case does not violate the Constitutional right to due process of law because it results entirely from the act of petitioner's Government. The Court stated, at page 13 of the slip opinion (R. 1931):

> "This [that Rule 37 does not exhaust the court's powers] is especially so where the action of a foreign sovereign, though a friendly one, has given rise to the problem, creating a situation hardly contemplated by the framers of Rule 37. Yet we cannot think they intended that a District Court would be powerless to solve the problem in a just manner, consistently with due process of law."

The decision of the Court of Appeals seems to constitute a blending of two ideas, namely, (1) that due process of law is not violated by requiring a plaintiff, regardless of its freedom from fault, to make full discovery as a condition to trial of its complaint—called "accepted procedures," and (2) especially, when "a plaintiff by action of its own government is disabled from complying with discovery rules applicable generally to litigants under the law of the forum."

Hammond Packing was disposed of at one point by the statement that it "seems inapplicable", (p. 13 slip op; R. 1931) and at another by the remark that "our view * * * does not lean heavily upon the theory of a factual presumption adverse to the one who fails

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[9] "* * * The question is when, upon the exercise of this sovereign power, it becomes impossible for a subject to comply with established procedures in this Court for securing evidence, shall this Court permit trial of the case? Or shall it rescind its order to produce? The question appears to be a *novel* one, not hitherto decided by a Court of the United States." (Emphasis supplied), (D.C. D.C. 111 F. Supp. 443; J.A. 619).

to produce the papers ordered." (p. 18, slip op; R. 1936). At still a third point, (p. 15, slip op; R. 1933) the Court remarked:

> "If the Swiss authorities had not then intervened, and if Chemie had willfully refused to comply with the order, dismissal of its complaint with prejudice, based on such refusal, would not have been an unconstitutional deprivation of property, *Hammond Packing Co.* v. *Arkansas, supra.* at 351."

The result is, petitioner submits, either that dismissal with prejudice and upon the merits is held to be proper without any fault on the part of a plaintiff, tested both by the Rules and by "due process", because "necessity for discovery as an aid in the development of facts" is an "accepted procedure", or it is held that a national of a friendly foreign government, standing before the courts of the United States, must assume, vicariously, full and absolute responsibility for what its sovereign may do upon its own soil in respect of its own laws.

Petitioner submits that the former runs headlong into the "due process" guarantee, as reflected in the *Hammond Packing* case; and that if the latter is the law,—which petitioner seriously doubts—this Honorable Court has not had the opportunity or occasion so to consider or to declare it.

Neither of the lower courts considered whether the 63,000 documents of the Sturzenegger Bank which were produced, satisfied respondents' needs. The Court of Appeals merely mentioned the fact that the documents were tendered to respondents and observed that it was not clear from the record what percentage of the papers ordered produced by the July, 1949 order was repre-

sented by the tendered documents.[10] Since both courts had their sights set upon full discovery only, any less quantity, no matter how substantial, did not appear to interest them. Good cause constituting such an important prerequisite to discovery under Rule 34, Fed. R. Civ. P., (see *Hickman* v. *Taylor,* 329 U.S. 495), and the number of tendered papers being so large, how can it be said on the part of respondents, without an inspection, that they cannot obtain what they are seeking from the available documents? Petitioner submits that the adoption of a reasonable alternative to summary dismissal, such as was done by the Second Circuit Court of Appeals in *Hyam* v. *American Export Lines, Inc.,* 213 F. 2d 221, in a comparable situation, avoids that which is tantamount to arbitrary action in dealing with such difficult problems.

REASONS FOR ALLOWANCE OF THE WRIT

Not since 1947, in *Hickman* v. *Taylor,* 329 U.S. 495, has this Honorable Court decided a case involving the discovery features of the Federal Rules of Civil Procedure. There, important questions were presented in a setting where the liberty of individuals was at stake. Here, property valued at $100,000,000 is involved. The property is claimed by petitioner, a Swiss corporation domiciled in Switzerland, and all its rights to the property are being cut off without a trial on the merits of petitioner's statutory action under Section 9a of the Trading with the Enemy Act (50 U.S.C. App. 9a).

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[10] At least the quantity is in excess of the figure of 55,550 (J.A. 235), which was in the District Judge's mind at the time of the order (J.A. 340).

As sanction for petitioner's non-compliance with a discovery order through no fault of its own, its action has been dismissed with prejudice, and the dismissal under Rule 41(b) Fed. R. Civ. P., operates as an adjudication upon the merits.[11]

This petition presents questions as to procedure in the District Court in the hearing and resolving of a complex and vigorously contested issue of "control" under Rule 34 Fed. R. Civ. P.; and whether a federal court—inherently, or under the Federal Rules of Civil Procedure, or under the due process clause—has the power and authority to dismiss with prejudice a cause of action when the plaintiff is without fault—either wilful or neglectful—in its non-compliance. An additional question in this case is whether, since there appeared to be a reasonable alternative which might have avoided such drastic action, the lower courts should have pursued that course, at least until it was demonstrated—if it could be—that such alternative did not provide adequate discovery to respondents under the circumstances.

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[11] Rule 41(b) provides, in part, as follows: "For failure of the plaintiff * * * to comply with * * * any order of court, a defendant may move for dismissal of an action * * *. * * * Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, * * * operates as an adjudication upon the merits."

See, also, the concurring opinion of Circuit Judge Fahy—the writer of the opinion in the case at bar, in *Holcomb* v. *Holcomb*, 93 U.S. App. D.C. 242, 209 F. 2d 794, in which he stated:

> "Rule 41(b) requires us to consider the dismissal of the first suit as an adjudication upon the merits."

Entire Rule 41(b) is reproduced in Appendix A, *infra*, p. 6a.

The District Court's conduct of the proceeding was so irregular, and its decision so unsupported, as to call for an exercise of this Court's power of supervision.

The discovery motion in this case is the rare exception to the "run" of such motions. The instant facts are more numerous and much more complex than those of most trials upon the merits of a case, and, in addition, they are seriously in dispute.

In such a situation, summary procedure by a District Judge, which was employed in this case and which is usually adequate to reach the correct determination regarding a discovery motion, has produced a proceeding in which the normal rules for the treatment and handling of evidence have been wholly ignored with the end result of evolving a record which abounds with hearsay, innuendo, *ex parte* statements, remarks of counsel and a great amount of outside-of-the-record-material. This was grievously so, as outlined on pages 10-11, *ante,* in which has been set forth a description of the manner in which the District Judge proceeded to hear the motion. The judge and respondents seemed to assume that anything which was in the file of the case—and, indeed, matters *not* in the file—could be resorted to without proof, formal or otherwise, of the alleged fact sought to be established.

There were no offers of proof, to which objections could be made. No witnesses were put upon the stand. Counsel, in briefs and in oral argument, adverted to papers in the Court's file without regard to whether the alleged fact involved was or was not established or admitted.

And the record which went to the Court of Appeals comprised a combination of all this heterogeneous material, much of which was relied upon by respondents to support the District Court's decision. One example

will illustrate the point. Respondents took the pretrial deposition of Dr. Hans Sturzenegger, one of petitioner's directors. It encompassed over 6,000 pages and consumed many months' time. Much of that deposition is reproduced in the Joint Appendix, beginning with page 755 in Volume II and filling all of Volume III. Petitioner does not dispute the proposition that admissions of this witness in his deposition may be invoked against it. However, the really serious difficulty arises with respect to numerous German documents which were marked by respondents for identification in the course of the deposition, and then shown to the witness who answered that he could not identify the document, nor recollect anything about any event referred to therein. Necessarily, such documents were annexed to the deposition, but in no sense do they constitute evidence. Yet, respondents caused many to be printed in the Joint Appendix, Volume IV, examples of which are given in footnote 7 on page 11, *ante*. Petitioner has no way of knowing what influence such documents may have had upon the Court of Appeals in concluding that the District Judge's "findings" "find adequate support in the record." That such documents may have had some effect upon the appellate court is illustrated by the following sentence appearing on page 10 of its slip opinion (R. 1928):

> "* * * we point out that the narration in Chief Judge Laws' opinion of the relation of Hans Sturzenegger to I.G. Chemie, his dominant position with respect to H. Sturzenegger & Cie., which is the successor to Ed. Greutert & Cie., the relation of the three companies to one another and to other companies, *including, on information now available, I.G. Farben and other German interests,* cannot be said by us to be erroneous." (Emphasis supplied.)

As we have heretofore indicated, it was this confused state of affairs that prompted petitioner to urge the District Judge to make findings of fact, since petitioner believed that the six paragraphs appearing in his opinion of February 19, 1953, (111 F. Supp. 440-1; J.A. 611-613), relied upon by the Court of Appeals on page 10 of its slip opinion (R. 1928),[12] and analyzed by petitioner in its petition for rehearing, *infra,* Appendix B, pp. 10a-13a, could not possibly be sufficient. As petitioner stated in its petition for rehearing, (p. 16a, *infra,* Appendix B):

> "We repeat that the six paragraphs in the lower court's opinion of February 19, 1953, heretofore analyzed, do not establish 'control' and mostly do not even relate to the subject; they not only lack 'definiteness', but are beside the point at issue; and the conclusion of 'control' finds *no* support in the record."

Rule 52(a) Fed. R. Civ. P. provides, *inter alia,* that—

> "If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein."

But the District Judge did not consider that findings of fact appeared in his opinion of February 19, 1953, or in any other memorandum for, at the time when petitioner urged him to make findings of fact,

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[12] Since no other part of the District Judge's opinion even remotely refers to any evidence *relating to control,* petitioner assumes that the Court of Appeals must have reference to the six paragraphs. These six paragraphs begin on page 440 of 111 F. Supp. (J.A. 611), directly following a paragraph whose concluding clause is "but since then other facts bearing upon the question have been introduced into the record."

the Judge stated in his memorandum of December 21, 1953, (J.A. 677-678) that "It therefore appears unnecessary * * * to make findings of fact."

It may be said that Rule 52(a) Fed. R. Civ. P., which requires findings of fact "in all actions tried upon the facts without a jury", is not applicable. That viewpoint is apparently based upon a technical and narrow interpretation of the rule. The cases are legion wherein appellate courts have required findings of fact upon complicated issues of fact, whether technically within or without the requirements of Rule 52.

In *Hurwitz* v. *Hurwitz,* 78 App. D.C. 66, 136 F. 2d 796, the United States Court of Appeals for the District of Columbia Circuit said:

> "The duty of the trial court to make findings of fact should be strictly followed. * * * Their purpose is to aid appellate courts in reviewing the decision below. In cases where the record is so clear that the court does not need the aid of findings it may waive such a defect on the ground that the error is not substantial in the particular case."

See, also, *King* v. *Wall & Beaver Street Corporation,* 79 U.S. App. D.C. 234, 145 F. 2d 377 in which the same court pointed out the requirement and need for findings of fact in connection with preliminary hearings which it described as "separate trials of separate issues."

While the above cases were decided before the amendment of Rule 52(a),[13] decisions after the amend-

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[13] The 1948 amendment added two sentences, the second of which provides: "Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 [Defenses and

ment make it clear that in complicated cases, where the facts are susceptible of different inferences, findings of fact are required of the trial court. In *Winter Park Tel. Co.* v. *Southern Bell. Tel. & Tel. Co.*, 181 F. 2d 341, the United States Court of Appeals for the Fifth Circuit so held with respect to a summary judgment granted for the plaintiff without any express findings of fact or conclusions of law.

In *Koehler* v. *United States*, 200 F. 2d 588, the United States Court of Appeals for the Seventh Circuit commented upon the provision of the Rule permitting the inclusion of findings in the opinion, with the statement that:

> "this provision does not relieve the trial judge of making *adequate* findings. *Life Savers Corp.* v. *Curtiss Candy Co.*, 7 Cir., 182 F. 2d 4, 6. The practice of commingling findings of fact and conclusions of law with other portions of an opinion is a practice that should be discouraged. It is almost inevitable that if findings of fact and conclusions of law are mixed up with the observations and arguments of the judge writing the opinion, such findings and conclusions are more likely to be inadequate than if the findings and conclusions of law are separately and definitely stated." (p. 592) (Emphasis supplied)

Objections] or 56 [Summary Judgment] or any other motion except as provided in Rule 41(b) [Involuntary Dismissal]."

The dismissal in this case is claimed by the Court of Appeals to be under Rule 41(b). A 1948 amendment to that Rule added, *inter alia*, the following: "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." There was an adjudication on the merits here. (See footnote 11 on page 16, *ante*.) Thus, it is clear that findings are required in this instance, as a matter of law.

In *Dearborn National Casualty Co.* v. *Consumers Petroleum Co.*, 7 Cir. 164 F. 2d 332, 333 the court stated as follows:

> "The court made an ultimate finding of fact * * * but no subsidiary findings of fact were made to indicate upon what findings this conclusion of ultimate fact was based. There must be such subsidiary findings of fact as will support the ultimate conclusion reached by the court."

There is nothing whatever in the District Court's opinion of February 19, 1953, to indicate the subsidiary or supporting facts upon which it reached the conclusion that appellant had the Sturzenegger records in its "possession, custody or control". The judge set forth no evidence, no testimony, no supporting findings that would permit it to convert a *prima facie* conclusion of "control" into an ultimate, final finding upon that vital issue.

Without such findings, either separately or in the opinion below, the Court of Appeals had no basis upon which it could really review the conclusion and judgment of the lower court with respect to the order for discovery. It was left only to speculate as to what influenced the trial judge and whether he based his conclusion upon facts actually proved and in the record. Indeed, the Court of Appeals seems to have disposed of the problem by placing complete reliance in their assumption that the District Judge had a "thorough acquaintance with the case in its various stages over a period of years." (p. 10 slip op.; R. 1928). While petitioner disputes such assumption—see footnote 6 on page 12a, *infra,* Appendix B, Petition for Rehearing in

Banc—petitioner respectfully points out that if appellate courts may make and rely upon such assumptions, the requirement for findings of fact could be nullified.

As this Court has recently said in a similar situation:

> "The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for a court of one judge, not for a court of nine."
>
> *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256, 92 L. Ed. 1347, 1350.

Thus, petitioner submits, the District Court so far departed from the accepted and usual course of judicial proceedings, and the Court of Appeals so far sanctioned such a departure, as to call for an exercise of this Court's power of supervision.

Both lower courts erroneously applied the Federal Rules of Civil Procedure in a novel way and in violation of the due process clause

The Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court; and has also decided a federal question in a way in conflict with an applicable decision of this Court.

On page 14 of the slip opinion (R. 1932), the Court of Appeals stated:

> "Rule 37 apart, Rule 41(b) would permit dismissal for 'failure' of the plaintiff to comply with an order of the court, thus reflecting the power thought

by the Rule framers to reside in the court aside from the specific confines of Rule 37." [14]

Under a doctrine which the Court of Appeals calls "accepted procedures" (pages 16 and 17 slip opinion; R. 1934-5),[15] mere failure to comply with a discovery order forfeits a plaintiff's right to go to trial. In other words, once eligible documents are declared to be in the possession, custody or control of a litigant, and a discovery order has issued, nothing thereafter excuses a failure to produce.

This is a novel decision. The District Judge so announced. (111 F. Supp. 444, 447). And the Court of Appeals has cited no judicial precedent or even a text writer in support of it.

This is not a case in which the defaulting party has offered no excuse, or a factually inadequate one. On the contrary, the Special Master reported without qualification the inability of petitioner to perform through absolutely no fault of its own, and the District Judge ratified that conclusion on the Master's part (111

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[14] In the light of the *Hammond Packing* case, Rule 41(b) can be no broader than Rule 37(b)(2)(iii), and it is subject to the same infirmity, namely, the denial of due process. Also, if faultless non-compliance on the part of a *defendant* occurred under the same circumstances as this case, Rule 41(b) would provide no reservoir of power to strike a defense, and neither Rule 55(a) nor any other Rule provides for the entry of a default in such a situation. Thus, if Rule 41(b) were construed to be applicable, it would necessarily produce the strange result of compelling discovery by a plaintiff or otherwise he would be subject to dismissal, with no comparable provision applicable to a defendant if he should fail to give discovery.

[15] "for developing the truth about contested factual issues • • •, the ultimate objective of the trial."

F. Supp. 440); and the Court of Appeals concurred in that result. (p. 13 slip op.; R. 1931). As clearly recognized by everyone, the Swiss Government, in the exercise of its "preventive police power",—*a force majeure*—placed it beyond the ability of petitioner in a physical sense to exhibit the Sturzenegger documents to respondents. (See pp. 4-5 slip op.; R. 1922-3).

Tested by the most elementary principles, the decision of the lower courts is unsound. The situation in the case at bar is wholly unlike any of the examples given by the District Judge (111 F. Supp. 446):

> "If plaintiff had failed to file a complaint seasonably within the time allowed by law, or had failed to state sufficient facts to show the pleader was entitled to relief, or had filed the complaint before a Court without jurisdiction of the parties or the subject matter, the same result would follow."

In order to dilute the startling effect of its decision, the Court of Appeals equates the action of petitioner's sovereign with fault of petitioner. This, too, is a novel proposition.[16] It is obviously not akin to the inapplicable doctrine that the forum determines the privilege, since neither a claim of privilege has been raised by petitioner (see footnote 13, p. 10, slip op.; R. 1928), nor does it lie in the physical power of petitioner, as it did in the *Prize Cases*,[17] to make discovery.

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[16] With the greatly increased use of discovery procedures under the Federal Rules of Civil Procedure, this question can arise frequently in the future in view of the attitude of foreign governments toward such a situation. *Cf.*, e.g., *Securities and Exchange Commission* v. *Minas de Artemisa, S. A.*, 150 F. 2d 215 (C.C.A. 9th, 1945).

[17] Discussed by the Court of Appeals beginning on page 19 of its slip opinion (R. 1937).

The Court of Appeals concedes that its reasoning must be squared with due process (see p. 14, slip op.; R. 1932), and apparently recognizing the full force of the *Hammond Packing* case, immediately proceeds to ignore it.[18] That the lower court *read* that case as petitioner does, is demonstrated on page 12 of the slip opinion (R. 1930):

> "*Hammond Packing Co.* v. *Arkansas* involved a refusal to produce which the Court termed a 'failure by the defendant to produce what we must assume was material evidence in its possession', and which defendant *had the power to produce.*" (Emphasis supplied)

It is clear from *Hammond Packing* that the constitutional right to strike the defense was based upon a pre-

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[18] Indeed, it would seem that the Court of Appeals is saying that the District Court had the power to take any action it saw fit, without specific authorization *by rule or statute*, provided only that it did not violate constitutional inhibitions. In this, it is going contrary to the thesis in *Hammond Packing Co.* v. *Arkansas* that there was no common law right or power of the Court to require discovery under the pain of possible dismissal or striking of a defense. Such power this Court found to rest with the legislature, which it held could create a rebuttable presumption of bad faith by the party refusing to produce the evidence.

The source of power of the Federal Rules of Civil Procedure is the Act of Congress of June 19, 1934, 48 Stat. at L. 1064, Ch. 651, now 28 U.S.C. § 2072. Such rules may not become effective until the close of the session during which they have been reported to Congress. The district courts have no authority to alter or enlarge upon these Rules in any way. The decision of the Court of Appeals that the District Court had power apart from and in addition to the Rules, to impose further requirements on the plaintiff "not inconsistent with accepted procedures", ignores the fundamental fact that the source of this power is legislative in origin.

sumption of fact—as to the bad faith and untruth of an answer—begotten from wilfulness, or, perhaps, carelessness. There, the defendant had the power to produce. This was expressly recognized by the Court of Appeals in the case at bar in discussing that case. "Failure" in the *Hammond Packing* case was used synonymously with "suppression"; while "failure" in the instant case means "through no fault of petitioner."

A presumption of bad faith can only arise or be created where the circumstances are reasonably susceptible of it. *Cf., Tot* v. *United States,* 319 U.S. 463, in which this Court stated (p. 467):

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience."

The Court of Appeals recognizes the weakness of its position by stating (p. 18, slip op.; R. 1936) that it "does not lean heavily upon the theory of a factual presumption." But, then it further expresses itself upon the same subject by stating that "there may be some element of adverse factual presumption." Petitioner submits that, under the *Hammond Packing* case, if the presumption does not and cannot arise in its entirety, a clash with the due process guarantee cannot be avoided.

Thus, the Court of Appeals decision is impaled upon the horns of a dilemma. If the presumption cannot properly arise, there may be no lawful dismissal of an action or striking of an answer, as the case may be; but for it properly to arise, there must be a failure to comply through some kind of fault which reflects bad

faith. Since, petitioner respectfully submits, the presumption cannot properly arise here, there may be no dismissal without violating "due process."

As indicative of the "extremes" to which the lower courts have gone in this case, there has been a dismissal *with* prejudice in a case where the party was free from fault, and, as well, an adjudication on the merits, since the dismissal so "operated" pursuant to Rule 41(b).[19] The legal effect is not only that petitioner may never refile its action, but that for purposes of *res judicata* petitioner is enemy-tainted and did not own the property.[20] The latter effect can come about *only* because petitioner's complaint is taken as untrue, since its allegations—not yet tried—are to the contrary.

Therefore, the presumption described in the *Hammond Packing* case has been fully invoked in a situation where there is, in fact, no bad faith, no proof of enemy-taint or lack of ownership, and no wilfulness in not obeying a discovery order.

Under Hickman v. Taylor the District Court should have reappraised its discovery order regarding the element of need when substantial production occurred

In the decision of the District Judge, the following is stated (111 F. Supp. 447; J.A. 626):

> "The attention of the Court has been directed to a statement of the Swiss Federal Attorney on

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[19] Petitioner sought to have the District Judge "otherwise specify", as provided in Rule 41(b), in order to avoid having the dismissal operate as an adjudication on the merits, (J.A. 674), but he declined to do so. (J.A. 678).

[20] These are the issues upon the merits of the case.

June 25, 1951, as reported in the findings of the Special Master:

> '. . . we are prepared to release individual documents proved to be indispensable for the suit, insofar as explicit statements are produced for each one of these documents by all the parties having an interest in them (banking firm H. Sturzenegger & Co., its clients and other individuals or juridical persons participating), from which it should be clearly evident that there is neither a violation of Art. 273 St. GB (economic espionage) nor of Art. 47 of the Bank Law (bank secrecy). The Office of the Swiss Federal Attorney explicitly reserves itself the right to refuse to release individual documents without stating grounds for this.'
>
> "* * * this Court is of opinion it should extend further opportunity to plaintiff to comply with the order to produce the documents designated. * * *"[21]

During the period of such extensions, petitioner sought and obtained numerous waivers from the bank's customers, and over 63,000 documents were released and brought to the United States. These were tendered to respondents who refused to examine them because they did not constitute *full* discovery. (Recital of these

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[21] Petitioner moved the District Court to require respondents to cooperate with petitioner in the preparation of applications for submission to the Swiss Federal Attorney for the release of documents, (J.A. 598), so that there could be mutual aid in trying to accomplish the desired result. Respondents resisted the motion and the District Judge denied it. (J.A. 627).

details appears on pages 5 and 6 of the slip opinion of the Court of Appeals, R. 1923-4.)[22]

Both lower courts ignored these 63,000 papers for the sole reason that they were not *all*. Petitioner urged the District Judge to require respondents to examine them upon the ground that such a vast quantity was substantial compliance, and it was possible that respondents might come to the conclusion that they could gain from such documents all the information they might need. It was petitioner's contention that after inspection by respondents, the judge could then reappraise the all-important element of need.

On page 16 of its slip opinion, (R. 1934), the Court of Appeals reasons that "Uncertainty as to the part the undisclosed papers would play creates the difficulty;" and on page 18, (R. 1936), that it relies in its decision "chiefly on the necessity for discovery as an aid in the development of facts."

Surely, the 63,000 documents are not "undisclosed papers," and no court can state, without looking, that they would not constitute "an aid in the development of facts."

This, petitioner respectfully submits, is quite comparable with the kind of situation which confronted this Court in *Hickman* v. *Taylor,* 329 U.S. 495, when, on page 512, it was stated:

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[22] On page 6 of the slip opinion, (R. 1924), the Court erroneously indicates that *petitioner* had made full production of the Sturzenegger papers upon an earlier investigation by the Swiss Government itself. Upon that investigation, implemented by Swiss war-time laws, the Swiss Government had direct access to the Bank's papers, not *via* petitioner, as in the case at bar. (See Petition for rehearing, p. 10a, *infra,* Appendix B.)

> "There was only a naked, general demand for these materials as of right and a finding by the District Court that no recognizable privilege was involved."

While, upon the facts of the *Hickman* case, the work-product and privilege of a lawyer were particularly involved, the case equally lays down a clear doctrine placing emphasis upon the element of need in discovery proceedings under Rule 34, Fed. R. Civ. P. On page 509, this Court stated:

> "We are thus dealing with an attempt to secure production of written statements and mental impressions contained in the files and the mind of the attorney Fortenbaugh *without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardships or injustice.* For aught that appears, the essence of what petitioner seeks either has been revealed to him already through the interrogatories or is readily available to him direct from the witnesses for the asking."[23] (Emphasis supplied.)

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[23] Besides the 63,000 documents referred to above, respondents had the following: Some 23,000 relevant documents found by respondents in Germany, Holland, United States and elsewhere (see J.A. 196); all of petitioner's papers—of which 70,000 microfilms were taken; the 6,000-page deposition of Dr. Sturzenegger, the head of the Sturzenegger Bank; depositions of Messrs. Merton, (J.A. 1826), Euler (J.A. 1865), and Schmitz (J.A. 1908); and a legion of living persons who are available as witnesses. The deposition of two of petitioner's leading figures—President Iselin and Director August Germann—were noticed by respondents but never taken. (J.A. 164).

On November 16, 1953, the District Judge wrote (J.A. 672):

> "Upon review of the proceedings in this case, and particularly developments since the last extension of time granted plaintiff to produce documents and records called for originally by order dated July 5, 1949, the Court is of opinion there is no reasonable likelihood plaintiff will be able to accomplish the full production required by law."

In effect, he thought that petitioner would be incapable of producing the balance of the Sturzenegger documents because they were impervious, for one reason or another, to the waiver procedures which petition had initiated at the suggestion of the Swiss Federal Attorney. At that apparent impasse, a sound discretion, petitioner submits, called for an inquiry as to whether anything further was needed, or, stated conversely, whether, as in the *Hickman* case, the papers not produced were necessary or the denial of their production would unduly prejudice the preparation of respondents' defenses or cause them any hardships or injustice.[24]

What underlies this entire case is the insistence of the two lower courts and the respondents—called by the Court of Appeals "accepted procedures"—that 100% discovery from a party's opponent is a *matter of right.* This Court held to the contrary in the *Hickman* case: and the principle of reasonable

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[24] It should be remembered that petitioner had moved for reconsideration of the original discovery order of July 5, 1949, before the District Court's decision of February 19, 1953, (J.A. 611), and had moved to be relieved from the status of default after the production of the 63,000 documents. (J.A. 663). Thus, the question regarding the element of *need* under Rule 34 continued to be before the judge up to the moment of actual dismissal.

alternative procedures was similarly recognized—again in the face of a demand for discovery "as of right"—by the Second Circuit Court of Appeals in *Hyam* v. *American Export Lines,* 213 F. 2d 21, in an opinion written by then Circuit Judge Harlan. How prophetic are his concluding words in their application to the case at bar, as follows:

> "The federal courts are open to foreign suitors as to others, and procedural rules are not to be construed in such fashion as to impose conditions on litigants which in their practical effect amount to a denial of jurisdiction. See *Washington-Southern Navigation Co.* v. *Baltimore & Philadelphia Steamboat Co.,* 263 U.S. 629, 44 S. Ct. 220, 68 L. Ed. 480."

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted, because the summary determination of the issue of control without a proper hearing, the refusal to consider the question of need, contrary to *Hickman* v. *Taylor, supra,* and the novel construction of the Federal Rules of Civil Procedure as authorizing dismissal of the complaint for non-compliance with the discovery order through no fault of the petitioner, contrary to *Hammond Packing Co.* v. *Arkansas, supra,* amount to a taking of petitioner's property without due process of law, and warrant the exercise of this Court's power of supervision.

Respectfully submitted,

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